United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6143

To be argued by
WILLIAM S. BRANDT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6143

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ONE 1974 PLYMOUTH FURY III SEDAN, VEHICLE IDENTIFICATION NUMBER PH41K4F158253,
Defendant in Rem.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

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Preliminary Statement

This is an appeal from a judgment entered by the Honorable Charles E. Stewart, pursuant to Rule 56, Fed. R.Civ.P., ordering the forfeiture of a 1974 Plymouth Fury automobile (the "vehicle") which was found by the District Court to have been used in violation of 21 U.S.C. §881(a)(4).

There was only one claimant to the vehicle before the District Court, the assignee of the registered owner of the vehicle. The registered owner was the mother of one Hugo Molina Perez who assigned her interest in the vehicle to Molina-Perez's wife who is the appellant herein.

Statement of Issues

1. Was the District Court correct in implicitly finding that no claimant with standing to raise the issue of the legality of the arrest and search of Hugo Molina-Perez was before the Court?

2. Was the arrest and search of Hugo Molina-Perez constitutional as found by Judge Weinfeld in the course of the criminal trial of Hugo Molina-Perez?

3. Was the District Court correct in finding that there was probable cause to seize the vehicle under 21 U.S.C. §881(a)(4)?

4. Did the enactment of 21 U.S.C. §881 repeal by implication similar, but non-conflicting provisions found in 49 U.S.C. §781?

Statement of Facts

A. The Arrest and Seizure

The facts underlying the arrest of Hugo Molina-Perez and the seizure of the vehicle are set forth chronologically as follows.* Special Agent Montagne of the Drug En-

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* The uncontroverted testimony upon which the District Court relied was that of two Special Agents with the Drug Enforcement Administration given during a suppression hearing before the Honorable Edward Weinfeld. The suppression hearing arose from the criminal trial captioned *United States* v. *Hugo Molina-Perez*, 74 Cr. 535, in which the issue of the constitutionality of the arrest and seizure of the cocaine in question here was raised and rejected by Judge Weinfeld. At that trial, Molina-Perez was charged with and convicted of possession of cocaine with intent to distribute and unlawfully carrying a firearm while committing a felony.

forcement Administration ("DEA") spoke to an informant several times during the period between April 10 and April 17, 1974 (T. 3, 13-14).* The informant told Montagne that a man named "Hugo Giving" ** living at 1505 Grand Concourse in the Bronx, was a cocaine dealer selling 1/8 and 1/4 kilogram quantities of cocaine (T. 3). The informant described the cocaine dealer as a Negro male, about 30 to 33 years old, approximately five foot seven or eight (T. 4). The informant told the agents that Molina-Perez left his apartment almost every night at about 10:30 P.M. with cocaine—possibly an eighth of a kilogram—which he intended to sell (T. 20, 50). The informant warned that Molina-Perez carried a gun which he would use and repeatedly stated that the agents should be careful (T. 51).

The informant was known to be reliable as he had previously provided information which led to the arrest of two persons for narcotics violations (T. 15, 16-17).

At about 10:00 P.M. on April 17, 1974, three special agents from DEA, accompanied by the informant, commenced a surveillance at 1505 Grand Concourse, the address given by the informant as Molina-Perez's residence (T. 4, 18-19).

At about 10:30 P.M., Molina-Perez came out of the building, at which point he was identified by the agents based on the informant's description and by the informant as the narcotics dealer he had described (T. 4, 19).

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* The letter "T." followed by a page number refers to the transcript of the suppression hearing held before Judge Weinfeld on August 19, 1974. A copy of this transcript is part of the supplemental record on this appeal.

** We will hereafter refer to him as "Molina-Perez" since Hugo Giving and Hugo Molina-Perez are one and the same person.

The agents followed him until he entered a parked 1974 Plymouth approximately one block away. At that time the agents drove up alongside the vehicle and identified themselves. Fearing that he was armed, they asked Molina-Perez, who was inside the vehicle, to place his hands where the agents could see them. This request was repeated several times in Spanish and English but Molina-Perez did not comply until the agents shouted it at him (T. 5, 21, 23-24, 51). Their request being complied with so reluctantly, and fearing that Molina-Perez might resist with a gun, they ordered him from the vehicle. A brief frisk followed. During the frisk the agents felt what they thought to be a gun and removed a loaded .38 calibre automatic pistol from Molina-Perez's belt (T. 5-7, 24, 25, 51-52). It was only after the loaded gun was found in his belt that he was handcuffed (T. 24) and arrested (T. 52). In the course of a full search of his person, the agents found a key case (T. 25). Identification found in Molina-Perez's wallet confirmed the address given by the informant as 1505 Grand Concourse (T. 5).*

A short while later, Molina-Perez was taken to DEA headquarters where a gram of cocaine was found wrapped in a $5 bill in his key case (T. 8, 27, 30). It was this cocaine which caused the agents to return and seize the vehicle (a-33).**

At the conclusion of the suppression hearing in Molina-Perez's criminal prosecution, Judge Weinfeld ruled that there was probable cause to make the arrest based upon information from an informant whom the Court found reliable. He also found that the search, pursuant to a

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* The agents gave Molina-Perez his *Miranda* rights in Spanish and English (T. 31). A subsequent search of Molina-Perez's apartment is not at issue here.

** The letter "a-" followed by a number is a reference to the appellant's appendix to this appeal.

lawful arrest, which uncovered the key case, was valid (T. 74).

Molina-Perez, was tried, and on September 24, 1974 convicted on both counts of the indictment charging him with: (1) possession of cocaine with intent to distribute, and (2) unlawfully carrying a firearm while committing the felony described in (1). A timely appeal was filed. However, on December 10, 1974 Molina-Perez was murdered.*

B. Procedural History

On November 1, 1974, the government filed an *in rem* complaint against the vehicle seeking its forfeiture (a-1). 21 U.S.C. § 881(b). On or about February 6, 1975, a claim was filed as required by Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims which govern *in rem* proceedings (a-4).** The claim was purportedly filed on behalf of two persons—Molina-Perez's

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* On July 30, 1975, at the request of Molina-Perez's appellate counsel, Judge Weinfeld dismissed the indictment (a-20), pursuant to *Durham* v. *United States*, 401 U.S. 481 (1971), as Molina-Perez had died pending appeal.

** Rule C(6) provides:

> The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. . . .

mother and his wife. While the claim asserted that Molina-Perez's mother was the registered owner of the vehicle, it did not describe any interest that his wife had in the vehicle.

On or about March 10, 1975, an answer, as required by Rule C(6) of the Admiralty Rules was filed by only one claimant—Molina-Perez's wife as the assignee of Molina-Perez's mother (a-7). The answer alleged that Molina-Perez's mother was not the owner of the vehicle (a-7, ¶ 2) but rather that Molina-Perez was the owner. Nevertheless, it asserted that his mother had assigned all of her interest to the appellant (a-9, ¶ 15). The answer did not allege that the appellant was making a claim for the vehicle in any capacity other than as assignee of the registered owner.

On August 14, 1975, the Government moved pursuant to Rule 12(c), Fed. R. Civ. P., for an order granting forfeiture. On August 28, 1975, the claimant cross-moved to suppress the cocaine and also moved pursuant to Rule 56, Fed. R. Civ. P., for summary judgment on the grounds that the cocaine was seized in violation of Molina-Perez's constitutional rights and that there was insufficient probable cause to seize the vehicle.

Because the claimant's motion raised issues concerning the applicability of 21 U.S.C. § 881, the Government *sought leave* to file an amended complaint by an affidavit filed September 18, 1975. The affidavit stated hypothetically that *if* the Court were to find 21 U.S.C. § 881 inapplicable, the Government would seek to amend the complaint to add 49 U.S.C. § 781 as a statutory basis for seizure. The Government annexed a copy of a pro-

posed amended complaint to the affidavit.* As the Court thereafter found 21 U.S.C. § 881 to be applicable, it was unnecessary to rule on the Government's motion to amend its complaint.

In any case, it is apparent that the District Court never permitted the filing of the proposed amended complaint as was required by Rule 15, Fed. R. Civ. P. There is no order permitting its filing nor is there such an entry on the docket sheet. The District Court did not refer to an amended complaint as the Court's memorandum opinion cites only to the Complaint (a-21, 28).

Without seeking permission from the Court, as required by Rule 15, Fed. R. Civ. P., the appellant served what purported to be an amended answer on October 11, 1975. The "amended answer", for the first time introduced a new party into the litigation, the voluntary administratrix of Molina-Perez's estate. This voluntary administratrix was appointed on September 30, 1975, ten months after the litigation commenced (a-19).**

On October 17, 1975, Molina-Perez's mother made a written assignment of all her interest in the vehicle to the appellant (a-12).

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* While appellant has included a copy of the Government's proposed amended pleading in the appendix (a-13), she has disturbingly neglected to include the covering affidavit establishing this as a mere proposed pleading. We have included this affidavit as an addendum to this brief. The addendum is referred to as pages 1a and 2a. The Government's tentative position, in regard to amendment of the complaint, conditioned upon the Court's ruling on the inapplicability of 21 U.S.C. § 881, was also set forth in the Plaintiff's Reply Memorandum of Law in Support of its Motion for Judgment on the Pleadings, etc. at p. 9.

** For an explanation of the procedures and powers concerning voluntary administrators, see, 2B Warren's Heaton, Surrogates' Courts, Chapter 36-A, § 205-A et seq. (1975 ed.).

ARGUMENT

POINT I

There is no claimant before this Court with standing to challenge the constitutionality of the arrest and search of Hugo Molina-Perez or to assert a lack of probable cause under 21 U.S.C. §881.

The appellant alleges that there were two claimants before the District Court. The District Court discussed the issues only in terms of the claimant-assignee, who admittedly has no standing to challenge the arrest. *Infra*, p. 9. The appellant asserts that there was additional claimant —the voluntary administratrix of Molina-Perez's estate— who was ignored by the District Court.* This claimant, standing in Molina-Perez's place, can allegedly challenge the constitutionality of the arrest "derivatively." However, because the administratrix was never a party before the District Court, this Court need not reach the issue of derivative standing. Thus, neither the voluntary administratrix nor the assignee can challenge the constitutionality of the arrest and search of Molina-Perez, nor can either of these claimants challenge the sufficiency of the probable cause to seize the vehicle.

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* The claimant-assignee and the voluntary administratrix are physically the same person. However, we submit that this physical identity is irrelevant as their capacities are unrelated.

A. The District Court Correctly Ruled That the Appellant as the Mere Assignee Lacked Standing to Challenge the Constitutionality of Molina-Perez's Arrest

The Court held, and appellant concedes on this appeal, that the registered owner, or that owner's assignee, does not have standing to raise the constitutional rights of some third person whose allegedly illegal arrest and search formed the basis of the seizure (a-23-24). Appellant's Brief pp. 7-8. It was not the vehicle which was searched but rather the individual—Molina-Perez. Thus, while the registered owner might have standing to challenge the search of the vehicle, the registered owner has no standing to challenge the search of the occupant of the vehicle. Both the District Court's conclusion and appellant's concession are amply supported by both the case law dealing with standing to challenge searches in general, *e.g. Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Jones* v. *United States*, 362 U.S. 257 (1960), and the law of standing to challenge forfeitures. *E.g., United States* v. *One 1963 Cadillac*, 250 F. Supp. 183 (W.D. Mo. 1966); *United States* v. *One 1953 Model Mercury Sedan*, 149 F. Supp. 657 (S.D. Ala. 1957).

B. There Was Only One Claimant Before The District Court—The Registered Owner's Assignee. The Voluntary Administratrix Was Never a Party to the Litigation

Judge Stewart was correct in not recognizing the voluntary administratrix of Molina-Perez's estate as a claimant. The claim and answer filed in February and March, 1975, respectively, did not include the ad-

ministratrix as a claimant (a-5). In fact, the voluntary administratrix did not even exist until September 30, 1975, over nine months after Molina-Perez's death, 10 months into the lawsuit and approximately six months after the claim and answer were filed.* The voluntary administratrix was apparently created solely for this litigation when the government challenged the standing of the assignee. Appellant's Brief at 7, footnote.

The only document supporting the standing of the voluntary administratrix as a party to this action was the so-called amended answer. However, this amended pleading was not before the District Court, and was properly disregarded by Judge Stewart. The Government's affidavit filed September 18, 1975, for leave to file an amended complaint was never granted. Considering the nature of the Government's affidavit, which was that leave to file an amended complaint was requested only *if* the Court found 21 U.S.C. § 881 inapplicable, and the Court's finding that 21 U.S.C. § 881 was applicable, there was no need to rule on the Government's motion (1a). A review of document number 11 of the record on appeal reveals no endorsement on that affidavit. The docket sheet does not indicate the Government's motion being granted. The docket sheet does not reveal any amended complaint being filed, and in fact one was not filed. The proposed pleading is referred to as no more than a proposed pleading in the Plaintiff's Reply Memorandum of Law in Support of its Motion for Judgment on the Pleadings, etc., at p. 9, filed with the District Court on September 18, 1975.

The Government never considered the amended complaint to have been filed, as evidenced by its subsequent

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* Thus issues under Rule 9(a), Fed. R. Civ. P. are not raised as the appellant did not have any administratrix capacity to plead when the claim and answer were filed.

affidavit of April 7, 1976, which references only the original complaint (a-34), not the amended complaint. The memorandum filed by the District Judge references only the complaint, not an amended complaint (a-21, 28).

Since there was no amended complaint before the District Court, the attempted filing of an amended answer without leave of the Court was not permissible. Rule 7(a), Fed. R. Civ. P. provides for certain permitted pleadings and that "no other pleading shall be allowed." Pleadings not permitted should be stricken or disregarded. *See*, J. Moore, 2A Federal Practice ¶ 7.02, p. 1532 (1975 ed.) and cases cited therein. Similarly, under Rule 15, an amended answer which is filed without leave of the Court is without legal effect. *Baxter* v. *Strickland*, 381 F. Supp. 487, 491 n.4 (N.D. Ga. 1974); *Momand* v. *Paramount Pictures Distributing Co., Inc.*, 6 F.R.D. 222 (D. Mass. 1946); *Gaumont* v. *Warner Bros. Pictures, Inc.*, 2 F.R.D. 45 (S.D.N.Y. 1941). We note that a review of the docket sheet reveals that the amended answer was not even docketed (a-a/b), and physically bears no receipt by the Clerk of the District Court.

Since leave was not sought to file the amended answer, and such leave was required, the amended answer was an impermissible pleading. Thus the fact that Judge Stewart did not address the administratrix's claims to the vehicle is perfectly proper and understandable. The administratrix was simply not a claimant before the Court, a fact which the District Court implicitly recognized.

As the administratrix was never a party before the District Court, and never duly filed any claim or answer as required by the Admiralty Rules, the District Court quite properly rendered its decision based on the standing of the assignee-claimant who was the only claimant before the District Court (a-21). Thus the District Court never reached the constitutional question of the legality of Molina-Perez's arrest.

The above discussion is dispositive of the standing issue and all succeeding issues on this appeal. The appellant asserts that Hugo Molina-Perez was the true and only owner of the vehicle, with all propritary, possessory, equitable and legal rights. Appellant's Brief at 9. If the appellant is correct, then the mere registered owner of the vehicle has no cognizable claim to the vehicle whatsoever, as she would be no more than a straw-person. The assignee of the registered owner can have no greater interest than that of the registered owner. As that assignee was the only party before the District Court there was never a claimant with any interest in the vehicle able to raise either the constitutional issues of the arrest and search or the more basic issue of the sufficiency of probable cause. A putative claimant who is not before the Court can not raise any challenges either.

Even if the District Court had found that a claimant before it could raise the issue of the validity of the arrest it would have found that challenge unfounded as discussed below.

POINT II

The search in which the cocaine was found was incident to a lawful arrest.

Judge Weinfeld correctly found no constitutional infirmity when the DEA agents searched Molina-Perez after lawfully arresting him. Where, as in this case, an informant of known reliability tells law enforcement agents that an individual is carrying narcotics and a weapon, the officers are entitled to stop the individual in order to conduct an investigation. At the time the stop is made the officers may check for weapons to insure their safety while they are making the investigatory inquiries. *Adams* v. *Williams*, 407 U.S. 143 (1972). In

making such a check for a weapon, the DEA agents found that Molina-Perez had a gun and at that point they had probable cause to arrest him for violating the gun and narcotics laws. While searching Molina-Perez after this lawful arrest, the DEA agents discovered cocaine. The vehicle involved in this case was seized because Molina-Perez had intended to use it to transport this cocaine. The appellant argues that the cocaine should be suppressed and that, as a result of that suppression, the vehicle should be returned to her.

This case is clearly governed by the decision in *Adams* v. *Williams*, 407 U.S. 143 (1972). In *Adams* a police officer received a tip from an informant that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The police officer approached the parked vehicle, tapped on the car window and asked the driver to open the door. Instead of following the police officer's direction, the driver rolled down the window. At that point the police officer reached through the open window and pulled a pistol from the driver's belt although the pistol was not visible to the police officer from outside the car. The driver was arrested and searched. Cocaine was found in his possession.

The Court held that in making an investigatory stop a police officer may protect himself from attack from a hostile suspect, especially when the officer believes the individual is armed and dangerous. *Adams, supra* at 146.

The Court first held that the informant's tip "carried enough indicia of reliability to justify the officer's forcible stop of Williams." *Id.* at 147. Significantly the indicia of reliability of the *Adams'* informant was less than that required to establish probable cause for an arrest under the standards laid down in *Spinelli* v. *United States*, 393 U.S. 410 (1969) and *Aguilar* v. *Texas*, 378 U.S. 108

(1964) and their progeny. The *Adams* informant said no more than: "[an] individual seated in a nearby car was armed and carried narcotics." The informant was known to the policeman personally "and had provided him with information in the past." *Adams, supra* at 146. However, the Court articulated no requirement that the informant had previously provided reliable information.

Second, the Court concluded that the officer had more than adequate reason to fear that he was in danger. The officer was investigating a person sitting alone in a car who was allegedly carrying narcotics and a concealed weapon.* The Court pointed out that the police officer had greater reason for fear when the driver rolled down his window, rather than complying with the police officer's request to step out of the car. If the suspect had stepped out of the car it would have enabled the police officer to observe his movements more easily. By not stepping out of the car and instead opening the window, the concealed weapon became even more of a threat and fully justified the officer's intrusion to find a gun. The intrusion was not a search for evidence but a measure designed to insure the officer's safety. *Id.* at 148. When the gun was found an arrest for a weapon's charge was justified. The subsequent search which yielded narcotics was a lawful incident to a lawful arrest.

This Court has described the test for a stop articulated in *Adams* as a "rather lenient" one. *United States v. Santana*, 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (Friendly, J.). It has also deemed an

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* The Court relied on statistics which proved that almost all policemen who were murdered were killed by guns. Other statistics cited by the Court established that of the policemen who were shot, approximately 30% were in the act of approaching a suspect in a vehicle. *Adams, supra* at 148 n.3.

investigatory stop to be a "minimal intrusion" into a defendant's privacy. *United States* v. *Riggs*, 474 F.2d 699, 703 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). (Friendly, J.). A recent application of the *Adams* test in this Circuit is found in *United States* v. *Salter*, 521 F.2d 1326 (2d Cir. 1975).

In *Salter*, two Border Patrol agents observed Salter, the defendant, escorting two women aboard a bus in Buffalo, New York. The agents, who had been conducting a routine "immigration check," asked all three where they had been born. The women answered, in a heavy accent, "Boofalo." On the basis of the suspicion aroused by this accent, the agents took Salter, who was merely accompanying the women, into a room for further questioning. Judge Friendly found the stop of Salter to be based upon reasonable suspicion within the meaning of *Adams* v. *Williams*, *supra*, 521 F.2d at 1328.

If the agents were justified in stopping Salter, who had himself done nothing affirmative to arouse their suspicion, we submit that the DEA agents had more than sufficient justification in stopping Molina-Perez. An informant, who had provided the agents with accurate information in the past, and whom Judge Weinfeld found to be reliable, identified Molina-Perez as a narcotics dealer who possessed narcotics. The DEA agents were warned that Molina-Perez was armed and that he would use his gun. This information entitled the agents to make an investigatory stop.*

The agents were repeatedly warned by the reliable informant "to be careful" (T. 51). Thus, when the agents

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* The DEA agents have the power to make an investigatory stop and frisk, when they have the power to arrest. 21 U.S.C. § 878(3). *See United States* v. *Riggs*, 474 F.2d 699, 702 n.2 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973).

approached Moina-Perez who was sitting in a darkened vehicle at night, they reasonably believed themselves in danger (T. 23, 51). The agents identified themselves (T. 23) and asked Molina-Perez, whose gun could have been on his lap, ready for use, to put his hands where the agents, who were outside the car, could see them. This simple, unobtrusive precautionary request repeated several times by the agents in Spanish and English was ignored by Molina-Perez until it was shouted at him (T. 51). The agents' apprehension that Molina-Perez might resist through the use of his gun was heightened by Molina-Perez's delay. To insure their safety the agents ordered Molina-Perez from the car (T. 24). As a result of a simple frisk, a course less intrusive than that followed in *Adams*, a loaded .38 calibre automatic pistol was found in Molina-Perez's belt, corroborating the informant and confirming the agents' fears. It was not until the pistol was discovered that Molina-Perez was arrested. An arrest was justified under 18 U.S.C. § 924(c)(2); *Williams* v. *Adams*, 436 F.2d 30, 43 n.3 (2d Cir. 1970). Additionally, the DEA agents would have been justified in making an arrest for a violation of state law. N.Y. Penal Law § 265.02 (McKinney 1976 Supp.). DEA agents are authorized to make such arrests. *See United States* v. *Reid*, 517 F.2d 953, 960-64 (2d Cir. 1975); *United States* v. *Martinez*, 465 F.2d 79, 81 (2d Cir. 1972).* A search pursuant to that arrest yielded a key case containing the cocaine which formed the basis of the later seizure of the vehicle.

The appellant attempts to distinguish *Adams* on the grounds that the DEA agents had probably drawn their guns as they approached Molina- Perez and that the drawn guns transformed the investigative stop into an arrest. This argument is simply wrong.

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* The finding of a gun corroborated the informant's previous information and also entitled them to arrest on a narcotics violation.

When making an investigatory stop police officers may reasonably draw their guns to insure their safety. Drawn guns do not transform an investigative stop into an arrest. *See, e.g., United States* v. *Diggs*, 522 F.2d 1310, 1314 (D. C. Cir. 1975); *United States* v. *Richards*, 500 F 2d 1025 (9th Cir. 1974), *cert. denied*, 420 U.S. 924 (1975); *cf., United States* v. *Riggs*, 474 F.2d 699, 703-05 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). In this case the agents were approaching a man who was believed to be armed and dangerous; he was sitting in a darkened vehicle at night in a high crime area. Molina-Perez's movements were concealed, particularly movements for a weapon. *Adams, supra* at 147-48. Approaching a suspect whose movements are totally visible is less fraught with danger than the situation facing the agents here. Under these circumstances of increased danger it was entirely reasonable for the agents to draw their guns before approaching Molina-Perez. *Id.; United States* v. *Santana*, 485 F.2d 365, 368-69 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *Harflinger*, 436 F.2d 928, 933 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

The Court must not establish too high a standard for those steps to be taken by the investigating officer when he believes a suspect is armed and dangerous. To do so will lead policemen not to investigate suspicious individuals or worse, it may lead to a loss of life. As this Court said in an analogous context:

> "Courts should not set the test of sufficient suspicion that the individual is 'armed and presently dangerous' too high when protection of the investigating officer is at stake." *United States* v. *Riggs*, *supra* at 705.

Because the actions of the agents were entirely proper, there is no basis for suppressing the cocaine.*

POINT III

There was sufficient probable cause to seize the vehicle.

A. The District Court's Findings

Although the Government bears the initial burden to show that probable cause for seizure exists, once that burden is met the burden shifts to the claimant to prove that the vehicle was not so used (a-25). 21 U.S.C. § 885(c); 19 U.S.C. § 1615.

Seizure of this vehicle occurred as the result of the discovery of cocaine in Molina-Perez's key case while he was being processed at DEA headquarters. It was that discovery which caused the DEA agents to return and seize the vehicle (a-33).** There is no doubt that the

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* The appellant argues that there is no collateral estoppel effect from Judge Weinfeld's ruling at the conclusion of the suppression hearing due to the defunct rule of *Durham* v. *United States*, 401 U.S. 481 (1971). *Durham* required the indictment and all underlying proceedings to be dismissed where the defendant died prior to the conclusion of the appellate process. Because we believe the other issues discussed in this brief are dispositive of this appeal we have not addressed appellant's argument concerning collateral estoppel at length. We do wish to note, however, that *Dove* v. *United States*, 96 S. Ct. 579 (1976), overruled *Durham*, permitted the underlying indictment to stand and dismissed the appeal. This Court should apply the law now in effect and apply the doctrine of collateral estoppel to bar the relitigation of an issue previously decided against appellant by Judge Weinfeld. Such a ruling would be consistent with the present law under *Dove* governing the continuing viability of indictments, and implicitly all proceedings concluded in the course of the criminal case, such as suppression hearing decisions, notwithstanding the death of the defendant-appellant.

** This amended finding replaces the finding by the Court at a-25 and a-28.

discovery of the cocaine upon Molina-Perez combined with the agents' knowledge that Molina-Perez was in the vehicle intending to drive it provided more than adequate probable cause for a seizure under 21 U.S.C. § 881 and 49 U.S.C. §781.

In order to justify the seizure the government must show that there was probable cause to believe that the vehicle was being used in violation of 21 U.S.C. § 881. *Ted's Motors, Inc.* v. *United States*, 217 F.2d 777 (8th Cir. 1954). Probable cause is interpreted as reasonable grounds for a belief in guilt. *Id.* at 780. *Carroll* v. *United States*, 267 U.S. 132, 155-56, 159-62 (1925); followed in *Chambers* v. *Maroney*, 399 U.S. 42, 48-52 (1970); *Brinegar* v. *United States*, 338 U.S. 160, 165-71 (1949); *Husty* v. *United States*, 282 U.S. 694, 700-01 (1931). Reasonable grounds means less than prima facie legal proof; however, there must be some evidence that the vehicle was used or intended to be used in a manner prohibited by the statute. *Ted's Motors, Inc., supra.*

The District Court found after reviewing the evidence adduced at the suppression hearing that there was probable cause to believe that the automobile was "intended for use to transport cocaine or intended to facilitate transportation or possession of cocaine" (a-29-30).

Once there was probable cause to believe the vehicle was intended to be used in violation of the statute, the burden shifted to the claimant to show otherwise. 21 U.S.C. § 885(c); 19 U.S.C. § 1615; *United States* v. *1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974); *United States* v. *Fields*, 425 F.2d 883 (3d Cir. 1970); *United States* v. *One 1971 Chevrolet Corvette*, 393 F. Supp. 344 (E.D. Pa. 1975). The appellant has introduced no evidence whatsoever to meet her burden of showing that the vehicle was not illegally used or intended to be illegally used.

B. 21 U.S.C. § 881 is Applicable to the Facts Herein

The appellant alleges that 21 U.S.C. § 881(a)(4) does not apply because there was insufficient nexus between the vehicle and the conduct prohibited by the statute. In other words, the Government failed to demonstrate that the vehicle was intended to be used to facilitate the transportation of narcotics. Section 881(a)(4) of 21 U.S.C. provides in pertinent part:

> "(a) Property subject.
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, *or are intended for use, to transport, or in any manner to facilitate the* transportation, sale, receipt, *possession or concealment of property described in paragraph (1) or (2)* . . . ." (emphasis added.)

There is no question that cocaine was found in Molina-Perez's possession at the time he was in the vehicle.

Although Molina-Perez had not yet started the engine (T. 22), the only logical reason for his entering the vehicle was to drive it. Therefore, the vehicle was *intended* to be used either for the transport of the narcotics, or was intended to be used to *facilitate the possession or transportation* of the cocaine. Appellant's legal argument to the contrary ignores the word *intends* which must be given meaning in the context of the statute. As the District Court concluded, the word *intends* applies to this

very situation, where the vehicle is not physically moved, but from the circumstances it is obvious that the car was *intended* to be moved and thereby transport narcotics (a-30).

Additionally, here the drugs were found in the physical possession of the occupant of the vehicle. This constitutes an *intent* to *facilitate* the possession of the cocaine. *See, United States* v. *One Dodge Coupe*, 43 F. Supp. 60 (S.D.N.Y. 1942) in which the court stated:

> "It can readily be seen that whether any particular connection of a vehicle with contraband, *where the contraband is not in the vehicle or in the possession of the occupant of the vehicle*, constitutes facilitation, is a question of degree, which is in turn a question of fact not readily susceptible to generalization." 43 F. Supp. at 61.

Thus, where as here the contraband was in the possession of the occupant of the vehicle, there is no question and a clear case of facilitation under the statute is established. *See United States* v. *One Oldsmobile Coupe Auto.*, 67 F. Supp. 686 (S.D. Calif. 1946). In *United States* v. *Fields*, 425 F.2d 883 (3d Cir. 1970), the vehicle was seized as the defendants "were getting into" the car at the airport after returning from a trip. At that time a "flight bag" was seized. At no time was the vehicle moving with the narcotics. The Court found a forfeiture proceeding to be appropriate.

The language "*intended for use, or in any manner to facilitate* the . . . transportation" of controlled substances, permits forfeiture if there is any connection whatever, between the use of the vehicle and the illegal activity. In the case at bar, the vehicle's connection was far from insubstantial. Molina-Perez entered the vehicle possessing cocaine, fully intending to drive away.

C. The Application of the Statute Herein is Supported by Congressional Intent

The Supreme Court has recently recognized that forfeiture statutes have a long history, a "broad sweep", and often a severe application. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-89 (1974) ("Calero"). That case, as have many others, upheld forfeiture of a conveyance, there a yacht, despite the unquestioned innocence of its owner, a company that had leased it to two persons who subsequently transported marihuana on it. To the degree that a claim of innocence is made on behalf of the appellant, as assignee of the registered owner, her position is no better than the yacht rental company in *Calero*. However, there can be no suggestion that Molina-Perez was innocent. In fact, the evidence adduced at the suppression hearing shows that he was a substantial drug trafficker. Forfeiture of the vehicle under the circumstances of this case is fully consistent with, and indeed mandated by, both the plain meaning of the present forfeiture statute and its policy and legislative history.

The forfeiture of this vehicle which was used with intent to transport or to facilitate the concealment or possession of cocaine, is consistent with an examination of the policy behind the forfeiture statute, as evidenced in its legislative history. In enacting amendments to the statute in 1950, Congress said:

> "Enforcement officers of the Government have found that one of the best ways to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. Vessels, vehicles, and aircraft may be termed the operating tools of dope peddlers, and often represent major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Govern-

> ment. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs. The proposed legislation is intended to provide an additional means of combating this nefarious activity."

H. Rep. No. 2751, 81st Cong., 2d Sess., 1950 U.S. Code Cong. Serv. 2952, 2953-54. *See, United States* v. *One 1941 Pontiac Sedan*, 83 F. Supp. 999, 1000-01 (S.D.N.Y. 1948).

The Government urged that the District Court find that under the facts presented in this case, the vehicle actually facilitated the concealment or possession of cocaine (as opposed to *intended* to facilitate, etc.). The District Court disagreed, finding insufficient facts to support such a theory (a-29). We urge, as an alternative holding herein, that this Court find that the vehicle was used to facilitate the possession or concealment of cocaine.

If Molina-Perez had put the cocaine under the seat of the vehicle there would be no doubt that the vehicle was used to facilitate the possession or concealment. If he had put the cocaine on the dashboard of the car under a newspaper, there probably would be no doubt that the vehicle was used to facilitate the possession or concealment. Where, as here Molina-Perez entered a vehicle with cocaine hidden in his key case, the vehicle served as one more layer of protection in his illicit activities. The vehicle made it easier, it assisted in Molina-Perez's possession and concealment of prohibited drugs. This theory is in fact suggested by the appellant who states hypothetically that Molina-Perez may have "entered the car to keep from being robbed or assaulted" (Appellant's Brief at 32-33). A vehicle can be a method of protection and concealment of the individual and the contraband he carries. Considering the broad interpretation that should be given the term "facilitation", we believe a finding that

the vehicle was facilitating the concealment or possession of drugs is justified.

In view of the Congressional purpose of exacting an "economic penalty, thereby rendering illegal behavior unprofitable", which was impliedly approved by the Supreme Court in *Calero, supra*, 416 U.S. at 686-87, this Court should order the forfeiture of the vehicle. Any other rule, offers unwarranted protection to the narcotics dealer, at the cost of the Government whose agents may well have prevented an automobile chase through the streets of the Bronx by accelerating their investigative stop to the point where Molina-Perez was in the vehicle but had not yet driven away.

D. The Cases Relied Upon by the Appellant are Inapposite

The appellant relies upon a line of cases which are readily distinguishable from the situation before this Court. In these cases the narcotics were never found in the vehicle or upon the person while in the vehicle. In those cases the automobile was used to drive to the scene of the narcotics transaction, or was used to travel to another vehicle in which narcotics were contained. Therefore, all those cases discuss the term "facilitate" in the context of no narcotics having been found in the vehicle or upon its occupant. In *Platt* v. *United States*, 163 F.2d 165 (10th Cir. 1947), the automobile was used to drive to a drugstore where narcotics were illegally obtained. The driver was seized outside of the car with the narcotics.* Thus, narcotics were never found in the car or upon the driver within the car. In *United States* v. *One 1972 Datsun*, 378 F. Supp. 1200 (D.N.H. 1974), no narcotics were ever found in the car or upon the driver while he was in the car.

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* That seizure was pursuant to 49 U.S.C. § 781.

Appellant's reliance upon *United States* v. *One 1972 Datsun, supra*, is also misplaced for reasons other than the above mentioned distinguishing facts. Therein, the defendant vehicle was twice used to lead an undercover agent to the driver's apartment, where LSD was sold to the agent. In denying forfeiture, the Court adopted a narrow rule, that facilitation required the Government "to establish a concrete, direct, and instrumental use of the vehicle in some aspect of the underlying criminal activity. *Id.* at 1203. The principal weakness of the *Datsun* case, is its erroneous reliance on what the Court saw as a trend toward narrowing the application of forfeiture statutes, a trend thought to have been spearheaded by the Supreme Court's decision in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971). See 378 F. Supp. at 1204. The *Datsun* case was decided prior to *Calero*. See 378 F. Supp. at 1204 n.9. In *Calero*, the Supreme Court explicitly rejected any contention that any prior decisions concerning forfeiture had been silently overruled by *United States Coin & Currency*, and impliedly, by its approving discussion of the "broad sweep" of forfeiture statutes, the Court rejected any trend toward narrowing the application of those statutes. 416 U.S. at 688-89. This implication is especially apparent when it is recalled that *Calero* upheld, against constitutional attack, a forfeiture against an innocent owner.

POINT IV

In enacting 21 U.S.C. § 881 Congress did not repeal 49 U.S.C. § 781 by implication.

In *obiter dictum* the District Court stated that 21 U.S.C. § 881 had repealed by implication the provisions of 49 U.S.C. § 781. The appellant argued below that because the recently enacted 21 U.S.C. § 881 did not pro-

hibit all the activities expressly prohibited by 49 U.S.C. § 781, an inconsistency was created and § 781 was repealed by § 881. As the appellant has raised this issue on appeal, the Government is compelled to respond and respectfully disagree with the District Court.*

We start with the general proposition that repeal of statutes by implication is not favored. *E.g.*, *Morton* v.

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* The two statute provide as follows:

49 U.S.C. § 781

§ 781. Unlawful use of vessels, vehicles, and aircrafts: contraband article defined.

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of any one in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession purchase, sale, barter, exchange, or giving away of any contraband article.

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21 U.S.C. § 881:

§ 881. Forfeitures.

(a) Property subject.

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

* * * *

(4) All conveyance, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport or in any manner to facilitate the transportation, sale, receipt, possession or concealment of property described in paragraph (1) or (2).

Mancari, 417 U.S. 535, 549-50 (1974); *Universal Interpretive Shuttle Corp.* v. *Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963); *Gresham* v. *Chambers*, 501 F.2d 687 (2d Cir. 1974). In order to reach the point of implied repeal the two statutes must be irreconcilable. *Morton* v. *Mancari*, *supra* at 550. There must be a positive repugnancy between the two statutes. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *General Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966). Inconsistency means more than merely inharmonious—"it connotes impossibility of concurrent operative effect." *In re Brown*, 329 F. Supp. 422, 426 (S.D. Iowa 1971). The fact that application of the two statutes might lead to two different results does not make the two statutes irreconcilable, "for that no more than states the problem" *Radzanower* v. *Touche Rosse & Co.*, 96 S. Ct. 1989, 1994 (1976).

This Court should construe these statutes together, in harmony so that they compliment each other. *Id.*; *Morton* v. *Mancari*, *supra* at 551; *General Electric Credit Corp.* v. *James Talcott, Inc.*, *supra* at 705; *City of Los Angeles* v. *Coleman*, 397 F. Supp. 547, 555-56 (D. D.C. 1975).*

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* Appellant relies on *United States* v. *Yuginovich*, 256 U.S. 450 (1921). That case is readily distinguishable. The question there was whether taxing provisions on the manufacture of alcoholic beverages were repealed by implication when the Volstead Act, enacting the Eighteenth Amendment's Prohibition, became effective. The two statutes conflicted because the same prohibited acts resulted in different penalties. There was Congressional intent to repeal the older law. The older penalties were based upon the legality of manufacturing alcohol. Herein, different acts result in a penalty; the penalty is the same-forfeiture.

There is nothing inconsistent or repugnant between 21 U.S.C. § 881 and 49 U.S. § 781. By appellant's own argument before the Court the two statutes apply to different situations and prohibit differing activities. Appellant's Brief at 28. In fact what occurs here is a complimentary scheme of statutes.* While there is admittedly some overlap, there are areas covered by one and not by the other. There certainly is no repugnance between the two statutes. Section 881 of 21 U.S.C. does not permit an individual to possess narcotics within a vehicle, it simply does not address that issue. However, 49 U.S.C. § 781 prohibits such possession. It is difficult to understand where the inconsistency or repugnance is; the two statutes can clearly be read harmoniously.

Further proof of the harmony between the two statutes is illustrated by the appellant who lists numerous cases where both 49 U.S.C. § 781 and 21 U.S.C. § 881 were used as the basis for forfeiture. Appellant's Brief at 30. The fact that appellant's argument is one of first impression is not so much an indication of its novelty as of its lack of merit. There is no conflict between the statutes so naturally no Court has addressed the issue.

What the appellant suggests to this Court is that the clear application of 49 U.S.C. § 781 can be evaded merely because 21 U.S.C. § 881 might arguably not cover Molina-Perez's actions. Congress did not intend to permit such an evasion and this Court should not permit it. *United States*

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* The fact that appellant describes 21 U.S.C. § 881 more specific and more recent than 49 U.S.C. § 781 does not vitiate the effect of 49 U.S.C. § 781. No exception is to be carved out of the general statute merely because of the existence of a more specific statute. *United States* v. *Burnett*, 505 F.2d 815 (9th Cir. 1974), *cert. denied sub nom., Lyon* v. *United States*, 420 U.S. 966 (1975).

v. *United Continental Tuna Corp.*, 96 S. Ct. 1319, 1323 (1976).

CONCLUSION

There was no claimant before the District Court who could challenge the sufficiency of either the probable cause or the arrest of Molina-Perez. In any case, the opinion of the District Court should be affirmed since there was probable cause to seize the vehicle under 21 U.S.C. § 881 and 49 U.S.C. §781, and the cocaine seized from Molina-Perez was properly discovered pursuant to a lawful arrest after an investigatory stop had revealed that Molina-Perez was carrying a concealed weapon.

Dated: New York, New York
December 6, 1976.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Plaintiff-Appellee, United States of America.

WILLIAM S. BRANDT,
SAMUEL J. WILSON,
LAWRENCE IASON,
Assistant United States Attorneys, Of Counsel.

ADDENDUM

Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civ. 4823 (CES)

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

ONE 1974 PLYMOUTH FURY, etc.,

Defendant in Rem.

State of New York)
County of New York : ss.:
Southern District of New York)

WILLIAM S. BRANDT, being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, attorney for the plaintiff, United States of America. As such I am familiar with and in charge of this matter. I make this affidavit in support of the Government's motion to amend the complaint in this action.

2. In response to the Government's motion for judgment on the pleadings, the claimant has raised certain issues concerning the propirety of proceeding with this action under 21 U.S.C. § 881. For the reasons set forth in the accompanying memorandum of law, we disagree with the claimant's position and believe that 21 U.S.C. § 881 is applicable to the instant case.

3. However, should the Court accept the claimant's position we would move that the complaint be amended to include 49 U.S.C. § 781 as an additional basis for forfeiture and to clarify the factual basis for the seizure. This amendment is sought pursuant to Rule 15(a), Fed. R. Civ. P. The claimant cannot prejudice by the amendment or undue delay. Had the Government been served with the claimant's answer to the complaint prior to August 14, 1975, which answer raised the issue concerning 21 U.S.C. § 881, the Government might have moved for the amendment earlier. If there is prejudice due to delay, the delay is the responsibility of the claimant.

4. A copy of the proposed amended complaint is annexed hereto as Exhibit A.

WHEREFORE, it is respectfully requested that the Government's motion to file an amended complaint be granted.

/s/ WILLIAM S. BRANDT
WILLIAM S. BRANDT
Assistant United States Attorney

Sworn to before me this
18th day of September, 1975.
/s/

★ U. S. Government Printing Office 1976— 714—017—001

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-6143

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 8th day of December, 19 76 she served two copys of the within Brief on Behalf of Plaintiff-Appellee, USA

by placing the same in a properly postpaid franked envelope addressed:

Steven H. Gifis
Rutgers University School of Law
180 University Avenue
Newark, New Jersey 07102

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

8th day of December, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978